mary Judgment. The District Court denied both motions. *Nemitz v. Norfolk & Western Ry. Co.*, 287 F. Supp. 221 (N.D. Ohio, W.D. 1968). Following the appellant's answer to the appellee's complaint, the District Court granted a second motion of appellees for summary judgment, from which appellant Norfolk and Western appealed. *Nemitz v. Norfolk & Western Ry. Co.*, 309 F. Supp. 575 (N.D. Ohio, W.D. 1969).

There are two primary issues to be resolved:

(1) Whether the District Court had subject matter jurisdiction to hear the appellee's action.

(2) Whether the appellees failed to exhaust their administrative remedies.

In order to case the issue as to subject matter jurisdiction in the proper context, a brief statement of the District Court's basis for finding jurisdiction is necessary.

The District Court found that the 1962 agreement had been incorporated into the 1964 I.C.C. order, such incorporation being necessary because Title 49 U.S.C. Sec. 5(2)(f) establishes minimum levels of protection for employees affected by the merger. By incorporating an agreement for the protection of employees in its order, the I.C.C. was merely fulfilling the duty imposed upon it by Sec. 5(2)(f). The effect of such incorporation is that the rights asserted by the appellees flow from the order and not from the collective bargaining agreement of 1962. Therefore, the District Court found jurisdiction under 49 U.S.C. §§ 5 and 9, and concluded that the National Railway Labor Adjustment Act did not apply. Furthermore, the District Court held that the appellees were not compelled to proceed under the 1962 agreement to arbitrate the basic dispute, but it did remit the parties to arbitration to determine the amounts to which the appellees are entitled.

The District Court then held that Implementing Agreement 1-A of 1967 did not deprive the District Court of jurisdiction. The basis of this holding was that the subsequent agreement was void as a matter of law in that it abridged the rights and protections afforded by the statute and the I.C.C. order.

Appellant argues that the rights asserted flow from a collective bargaining agreement and hence are to be determined by arbitration under the provisions of the Railway Labor Act. It further insists that Implementing Agreement 1-A superseded the I.C.C. order.

Essentially three subsidiary issues underlie a determination of subject matter jurisdiction of the court below. (1) Whether the appellees are required to proceed under the 1962 collective bargaining agreement; (2) whether the 1962 agreement was incorporated into the I.C.C. order of 1964; and (3) whether the 1967 Implementing Agreement 1-A superseded the I.C.C. order.

In deciding the jurisdictional issues thus presented, the Court must dispose of a preliminary question; whether the Railway Labor Act, 45 U.S.C. Sec. 153, et seq., is applicable, even if it be assured that the rights here asserted by the appellees stem from an I.C.C. order. If the Railway Labor Act applies, jurisdiction does not lie. *Brotherhood of Local Engineers v. Chicago & Northwestern Ry. Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1968).

49 U.S.C. Sec. 5(11) provides in part, that "the authority conferred by this section shall be *exclusive* and *plenary*." (Emphasis added.) Various cases dealing with consolidations pursuant to 49 U.S.C. Sec. 5 justify our emphasizing the words "exclusive" and "plenary." *Brotherhood of Loc. Eng. v. Chicago & Northwestern Ry. Co., supra; Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961); *Railway Labor Executive Association v. United States*, 339 U.S. 142 (1950); *United States v. Lowden*, 308 U.S. 225 (1939). These cases dealt with the propriety of granting exclusive authority to the Interstate Commerce Commission in consolidations pursuant to 49 U.S.C. Sec. 5, and with the intent of Congress as evidenced by the defeat of the Harrington Amendment.[5] The cumulative effect of the decisions is that there

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[5] The Harrington Amendment would have brought about a job freeze of existing employees and, thus, "threatened to prevent all consolidations to which it related." Railway Labor Executives' Assoc. v. United States, *supra* at 150-151.

must be exclusive and plenary authority in the I.C.C. to achieve the purposes of the Act. The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied. *Brotherhood of Loc. Eng. v. Chicago & Northwestern Ry. Co., supra.*

It is the contention of the appellant that the I.C.C. did not incorporate the protective conditions for the appellees into its 1964 order authorizing the merger. The argument proceeds that since the provisions of the 1962 agreement were not incorporated, the rights asserted by the appellees cannot stem from the order, and, therefore, the federal courts are without jurisdiction. The rationale in support of this contention is that: (1) the appellees' suit is based on protective benefits afforded them under the 1962 agreement; (2) the 1962 agreement was an agreement made pursuant to the last sentence of 49 U.S.C. § 5(2)(f) and was independent of the I.C.C. order; (3) § 5(2)(f) was intended as an alternative to I.C.C. imposed protective conditions for the benefit of affected employees; and (4) the I.C.C. not having incorporated these conditions federal jurisdiction does not lie. Appellant adds that the appellees' union affirmed this interpretation when it refused to arbitrate.

The position now taken by the appellant is contrary to its position previously taken. For example, it is to be noted that the appellant's Answer to the Complaint of the appellees admitted that the 1962 agreement was incorporated into the authorization order of the I.C.C. in 1964. Also, all interested parties entered into a "Stipulation and Agreement" before the Commission, which provided that the provisions of the 1962 agreement "shall be applied for the protection of the interests of the employees . . . as required by § 5(2)(f) of the Interstate Commerce Act. . . ."

After a consideration of the record in the instant case, we are of the opinion that all parties understood that the provisions relating to benefits for affected employees in the 1962 agreement would be, and were, incorporated into the I.C.C. order. In addition, we are of the opinion that the Commission, by incorporating the 1962 agreement, was fulfilling the requirement of 49 U.S.C. § 5(2)(f), which provides, in part:

> As a condition of its approval, under this paragraph . . ., the Commission *shall require* a fair and equitable arrangement to protect the interests of the railroad employees affected. 49 U.S.C. § 5(2)(f). (Emphasis added.)

The applicable case law tends to support the interpretation of the words, "shall require," as imposing upon the I.C.C. the duty to make provisions for the protection of affected employees. *Railway Labor Executives' Assoc. v. United States, supra; Brotherhood of Maintenance of Way Employees v. United States, supra; Clemens v. Central R.R. Co. of New Jersey,* 264 F. Supp. 551 (E.D. Penn. 1967), *reversed* (on other grounds), 399 F.2d 825 (3rd Cir. 1968); *cert. denied,* 393 U.S. 192 (1969), and others.

In this regard, the appellant argues that the I.C.C., as it has in various other cases cited by the appellant, noted that it would not impose protective benefits for the appellees because of the existence of the 1962 agreement. Since, as appellees argue, the 1962 agreement was made pursuant to the last sentence of § 5(2)(f), and since the I.C.C. stated that it need not provide for protective conditions by virtue of the fact that an agreement dealing with protective conditions was already in existence, appellant reasons that the 1962 agreement was not incorporated into the order. However, the existence of a prior agreement does not allow the I.C.C. to ignore its statutory duty. On the contrary, the I.C.C. is required, as we have noted, to impose employee protective conditions whether derived from an agreement or independently formulated by the I.C.C. This is precisely the situation now before the Court. The I.C.C. first deter-

mined that the protective conditions in the 1962 agreement were adequate and then concluded that it did not deem itself compelled to elaborate on those conditions, merely stating that the conditions were subject to the order. It is significant that, regarding the protection of employees not covered by the 1962 agreement, the I.C.C. did separately impose protective conditions in the same order. We find that the 1964 order in disclaiming the necessity for protective conditions, must be construed as meaning that such conditions need not be spelled out or elaborated in the 1964 order since they were sufficiently covered by the 1962 agreement, a construction which is consistent with the theory of incorporation as well as with the I.C.C.'s statutory duty. We conclude that the rights set forth in the 1962 agreement were incorporated in the 1964 order and for purposes of federal court jurisdiction stem from such order. The appellant in taking a contrary position relies upon the case of *Arnold v. Louisville & Nashville R.R. Co.*, 180 F. Supp. 429 (M.D. Tenn. 1960), as *affirmed* by the Court of Appeals in *Batts v. Louisville & Nashville R.R. Co.*, 316 F.2d 22 (6th Cir. 1963). We do not deem *Arnold* to be controlling on the facts presented here. See *Clemens v. Central R.R. Co. of New Jersey*, 264 F. Supp. 551 (E.D. Penn. 1967), reversed (on other grounds), 399 F.2d 825 (3rd Cir. 1968), *cert. denied*, 393 U.S. 192 (1969). In *Arnold*, the plaintiffs were railroad employees seeking damages in federal district court for breach of protective conditions allegedly flowing from an I.C.C. order authorizing a merger, affecting the plaintiffs. As contemplated by the order, the plaintiffs' union had entered into a collective bargaining agreement with the railroad subsequent to the I.C.C. order in question. This collective bargaining agreement dealt with conditions and arrangements for the protection of employees and sought to supplement the prior I.C.C. order as to these conditions. In asserting their rights to damages, the plaintiffs argued that their representatives were without authority to "bargain away" rights derived from the I.C.C. order. In rejecting the plaintiffs' argument, the District Court held:

> Under this provision of the statute (the last sentence of Sec. 5(2)(f), as the Court construes its meaning and effect, the employees may, through a collective bargaining agreement with the railroad, make provisions for their own protection by *adopting, supplementing* or *implementing* the provisions made by the Commission for their protection. Arnold v. Louisville & Nashville R.R. Co., *supra,* 433-434. (emphasis added.)

The District Court then concluded that the plaintiffs' representatives properly exercised their authority in reaching such an agreement with the railroad and that the agreement displaced the I.C.C. order insofar as it related to the same subject matter. Since the rights asserted necessarily stemmed from the agreement and not the I.C.C. order, those rights could be vindicated neither in an action to enforce an order of the I.C.C., under 28 U.S.C. Sec. 1336, nor in an action for damages under 49 U.S.C. Secs. 8 and 9. Although the *Arnold-Batts* decision did not reach the question of whether the Railway Labor Act was applicable, the Court did observe that, even if the Railway Labor Act was inapplicable, the plaintiffs were required to exhaust their administrative remedies. *Arnold v. Louisville & Nashville R.R. Co., supra,* at 434.

Appellant next contends that Implementing Agreement 1-A superseded the Commission's order of 1964. The contention is that the effect of the 1967 agreement was to preclude the appellees from asserting their claims in the District Court and to vest exclusive jurisdiction in the National Railroad Adjustment Board. This argument also addresses itself to the subject matter jurisdiction of the District Court.

The District Court ruled that Implementing Agreement 1-A was void as a matter of law because it abridged the rights and protections afforded by the statute and the I.C.C. order.

The appellant again asserts that the last sentence of § 5(2)(f) is an alternative to the first two sentences thereof. Appellant contends that no minimum level of protec-

tion for employees is required by the Act and that a voluntary collective bargaining agreement does not have to be consistent with the I.C.C. order. Appellant also argues that the ruling by the District Court has the effect of "second-guessing" the duly constituted bargaining representative of the appellees. Finally, appellant again urges that the *Arnold* case as affirmed by this Court requires us to hold that the subsequent agreement superseded the I.C.C. order insofar as it related to the same subject matter.

The effect of the *Arnold* case on the collective bargaining agreement here (Implementing Agreement 1-A), must be viewed within the context of the second sentence of § 5(2)(f). That sentence provides:

> In its order of approval the Commission *shall* include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order *being placed in a worse position* with respect to their employment. . . . 49 U.S.C. § 5(2)(f). (Emphasis added.)

Cases construing the Act have held that this language means that employees shall not be placed in a worse position with respect to compensation and that no "job freeze" is required. *Brotherhood of Maintenance of Way Employees v. United States, supra,* pp. 176-177. In *Arnold,* the Court did *not* hold that the collective bargaining agreement placed the employees in a worse position, but rather that the agreement in question *supplemented* the I.C.C. order. Here the subsequent agreement abridged rights previously vested in the appellees by virtue of the I.C.C. order. The agreement in *Arnold* did not take away rights already granted, but merely added a new term to the I.C.C. order. The agreement now before us, in contrast, goes to the very heart of the protections to be afforded the appellees under the order. Furthermore, we find Implementing Agreement 1-A to be contrary to the policy of the Act, as

embodied in the second sentence of § 5(2)(f), which expressly makes provision to protect employees affected by a merger. The appellees here would appear to be precisely those employees protected by the provisions of the Act. The merger split their seniority district and, as a result, they were unable to receive the working time previously obtainable before the merger—no matter which option they chose. As the 1967 agreement abrogated certain rights and protections previously guaranteed to the appellees, we are in agreement with the District Court that the agreement is unenforceable. An agreement made pursuant to the last sentence of § 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially abrogate employees' rights grounded in an I.C.C. order. Nor may it frustrate the policy of the Act, as Implementing Agreement 1-A clearly did in the present case.

In the alternative, appellant attacks the jurisdiction of the District Court on the basis of an alleged failure of the appellees to exhaust their administrative remedies. Appellant urges that the appellees are required to exhaust such remedies because of the arbitration clause contained in the 1962 agreement which, as we have seen, used the language "may be referred." This contention also looks to the *Arnold* case, as affirmed by this Court in the *Batts* case, for authority. If its contention that arbitration is required under the I.C.C. order is sustained, the appellant then contends that the appellees' application to the union to arbitrate followed by the latter's refusal to do so, did not constitute the required exhaustion before invoking judicial intervention, citing *Vaca v. Sipes*, 386 U.S. 171 (1967).

The District Court on alternative grounds ruled in favor of the appellees on the exhaustion issue. First, the District Court noted that the appellees had reached a "dead-end street" in their attempt to utilize union remedies and that the doctrine of exhaustion presupposes an adequate remedy, citing *Marsh v. County School Board*, 305 F.2d 94 (4th Cir. 1962). The District Court also concluded that the arbitration provision in the I.C.C. order was "permissive," and, since neither the union nor the

appellant had invoked arbitration it was not required and the District Court had jurisdiction of their claim.

A number of authorities have been examined to determine the effect of the words "may be referred" in an arbitration clause, including, in addition to the opinions in *Arnold* and *Batts, supra, Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30 (1957); *New Orleans & Northwestern R.R. Co. v. Bozeman*, 312 F.2d 264 (5th Cir. 1963); *Parsons v. Norfolk & Western Ry Co.*, 310 F. Supp. 1197 (S.D. W.Va. 1970); *Bonnot v. Congress of Independent Unions, Local #14*, 331 F.2d 355 (8th Cir. 1964); *Brotherhood of Local Engineers v. Chicago & Northwestern Ry. Co., supra.* All of these cases may be cited as support for the proposition that the use of the word "may" does not necessarily mean that the arbitration clause is permissive. Perhaps the strongest statement in this regard is to be found in the *Bonnot* case, wherein the Court of Appeals for the Eighth Circuit held:

> The obvious purpose of the 'may' language is to give an aggrieved party the choice between arbitration and the abandonment of its claim. Bonnot v. Cong. of Independent Unions, *supra*, p. 359.

In *Batts* this Court held that the "may" arbitration clause was mandatory and not permissive, citing the *Bozeman* case, wherein the Court of Appeals for the Fifth Circuit interpreted and relied upon the *Chicago River & Indiana* case.

> The crucial language of the *Bozeman* opinion is:
>
> We conclude that Section 8 of the Oklahoma Conditions gave either party the absolute right to select arbitration as a means for settling disputes and when such selection was made then arbitration was mandatory on the other party. New Orleans & Northwestern R. R. Co. v. Bozeman, *supra*, at p. 267.

The Court of Appeals went on to say, "We think this is the teaching of the Supreme Court's opinion in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*"

It is manifestly clear that the proposition upheld in each of the above cases is that the election by one of the parties to an agreement to arbitrate makes the clause compulsory, not that the clause is in all events mandatory. It is significant that in *Arnold-Batts,* in *Bozeman,* and in *Chicago River & Indiana R.R.,* involving the "may" language, one party had elected to submit the dispute in question to arbitration, and that each court then concluded that the arbitration clause because of such election became mandatory as to the other party.

In *Bonnot,* the Court of Appeals made the statement, quoted *supra,* which in effect characterized the "may" clause as absolutely mandatory, relying upon *Steelworkers v. American Manufacturing Company,* 363 U.S. 564 (1960) and *Deaton Truck Line, Inc. v. Local Union #612,* 314 F.2d 418 (5th Cir. 1962). The *Deaton Truck Line* case interpreted the *American Manufacturing Company* case, and citing that case, the Court of Appeals stated:

> Clearly, however, "may" should be construed to give either party the option to require arbitration. Deaton Truck Line, Inc. v. Local Union #612, *supra,* p. 422.

Thus the cases cited by *Bonnot* do not compel the conclusion reached by the Eighth Circuit that the "may" clause is absolutely mandatory, in the sense of requiring either arbitration or abandonment of the aggrieved party's claim.

We are persuaded that the arbitration clause now before us was permissive until such time as the union or the appellant invoked arbitration. If either had done so, arbitration would have been required. As neither the union nor the appellant invoked arbitration, the clause remained permissive and the appellees may not be said to have failed to have exhausted their administrative remedy by virtue of the fact that their grievances were not submitted to arbitration.

We further are of the view that the appellees in this case have fulfilled any possible requirement for exhaustion of administrative remedies in that they sought to have arbitration invoked and were refused that remedy by their

union. In pressing their grievances, the appellees had gone as far as they could have gone within the grievance settlement machinery.

The appellant cites the case of *Republic Steel Corporation v. Maddox*, 379 U.S. 650 (1965), as authority for the proposition that the appellees had not gone far enough to excuse the exhaustion requirement. *Maddox* holds that the employees "must attempt use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress." In *Maddox*, the Supreme Court reasoned that the union should be given the "opportunity to act" in order that the policy of preserving union influence may be effectuated. The record here supports the finding that the appellees did "attempt" such use of the contract grievance procedure within the meaning of *Maddox*, but that they were frustrated in this attempt when the union refused to request arbitration. Thus to hold on such facts that administrative remedies have been exhausted would in no way undermine union influence which was of primary concern to the Supreme Court in the *Maddox* ruling.

Appellant calls our attention to the case of *Vaca v. Sipes, supra*, an employee action against the union for breach of its duty of fair representation, wherein the Supreme Court indicated that exhaustion was not excused unless the employee proved that the union had breached its statutory duty of fair representation. To constitute such a breach, the union must have acted in an arbitrary, discriminatory, or bad faith manner. However, the Supreme Court also indicated in *Vaca v. Sipes* that an exception to the exhaustion requirement may exist where the effort to proceed with further administrative remedies would be futile. In the later case of *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 330 (1969), the Supreme Court affirmatively recognized the validity of this exception. That it would have been a futile gesture for the appellees to have attempted to proceed further with the arbitration procedure, is readily apparent from the record before us.

Having concluded that the rights of the parties should be declared in accordance with this opinion, we come to the question of damages.

In accordance with the terms of the I.C.C. order, appellees are entitled to damages pursuant to 49 U.S.C. Secs. 8 and 9 to the extent that their compensation has been diminished by their inability to perform work throughout the Toledo Division. To the extent that their compensation may have been diminished by furloughs due to seasonal requirements, or by any decline in traffic or revenues, they are not entitled to damages. In these conclusions we are in agreement with the District Court. We do not agree, however, as the District Court held, that the question of damages should be determined by arbitration. Rather, it appears to us that since the District Court has jurisdiction of the appellees' claims, it must adjudicate those claims in their entirety—the basic dispute between the parties as well as the relief to be afforded to each appellee.

Accordingly, the judgment of the District Court will be modified in accordance with this opinion and the action will be remanded to the District Court for further proceedings.

Modified and remanded for further proceedings.

No. 20,326.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

RICHARD NEMITZ, *et al.*,

Plaintiffs-Appellees,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant-Appellant.

BEFORE: CELEBREZZE and MILLER, *Circuit Judges* and WEINMAN, *District Judge.*

JUDGMENT.

(Filed January 15, 1971.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel,

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby modified and the case remanded to the District Court for further proceedings consistent with the opinion.

It is further ordered that costs on appeal be taxed three-fourths to the Defendant-Appellant, Norfolk and Western Railway Company and one-fourth to the Plaintiffs-Appellees, Richard Nemitz, et al., and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

EXCERPT FROM REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION, F. D. No. 21510.

* * * * *

(72*)

Employee conditions.—As previously stated herein and in Appendix A, various agreements have been reached between employee representatives and the Norfolk & Western for the protection of employees adversely affected by these transactions. Our authorizations herein will, by reference, be made subject to such agreements. For the benefit of employees not covered by such agreements, the hearing examiner recommended the imposition of protective conditions similar to those imposed in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177. However, it has been our experience in proceedings (73) of this nature that more adequate protection is afforded by the conditions prescribed in *Southern Ry. Co.-Control-Central of Georgia Ry. Co.,* 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C 377. Therefore, the conditions prescribed in the latter case will be imposed by reference in our order for the protection of railway employees not covered by the agreements and adversely affected by the transactions. For the purpose of such conditions, as far as the acquisition of stock control of the Wabash by the Norfolk & Western is concerned, the effective date of our order is to be the date of consummation of such stock control.

We find that, as conditioned herein, the transactions under consideration meet the requirements prescribed by sections 5(2) and 20a of the Act and conform generally with the purposes and objectives of the national transportation policy declared by Congress. We are convinced that the transactions should be approved.

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* Boldface numerals in parentheses throughout this appendix refer to the original typewritten pages.

EXCERPT FROM APPENDIX TO THE I.C.C.'s REPORT AND ORDER.

* * * * *

(33) Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of the Railway Labor Executives' Association, for the protection of employees of Norfolk & Western, Nickel Plate and Wabash, as well as persons employed on the Sandusky Line of Pennsylvania, represented by these organizations. This agreement, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules and agreements of Nickel Plate and Wabash, as well as those having application on the Sandusky Line, basically requires that job eliminations as a result of the unification be accomplished only through normal attrition. Under its terms, Norfolk & Western agrees to take into its employment, upon consummation of the merger, lease and purchase, all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue.

The agreement also authorizes Norfolk & Western to transfer the work of employees throughout the merged system and requires the labor organizations to enter into implementing agreements permitting employees either to follow their work or be assigned to other jobs within their craft or class within the same general locality as existing jobs, following a period of retraining, if necessary, at Norfolk & Western's expense.

Norfolk & Western has also entered into an agreement with the Great Lakes Licensed Officers' Organization, a labor organization representing certain marine employees of Wabash, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules and agreements between Wabash and the Great Lakes Licensed Officers' Organization, and further provides, in effect, that no employee of Wabash who is a member of

the named organization will be adversely affected in his employment as a result of the proposed lease or merger of Wabash by or into Norfolk & Western.

It was stipulated that under any report and order approving the proposed merger, lease and purchase it may be considered that these agreements were made pursuant to and in conformity with section 5(2)(f) of the act for the protection of the covered employees.

* * * * *

LETTER, APRIL 7, 1966, N&W VICE PRESIDENT H. C. WYATT TO BROTHERHOOD GENERAL CHAIRMAN J. F. McNEEL.

Merger claims of Sandusky District Trainmen and Conductors—October 16, 1964, through November, 1965—

April 7, 1966

Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
Room 209,
683 East Broad Street,
Columbus 13, Ohio.

Dear Sir:

Please refer to our conference in your office at Columbus, Ohio, on March 31, 1966, at which were also present Messrs. P. V. Hemmer, J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Trainmen and Conductors, allegedly adversely affected by the merger under the provisions of Section 3 of the Agreement of January 10, 1962, were considered.

We agreed to dispose of forty-six of these claims for the period October 16, 1964, through November, 1965, under the provisions of letter of understanding addressed to you under date of October 25, 1965, by the allowance

of the net amount shown opposite the respective names of employes listed on attached statement, less applicable deductions.

It was further understood and agreed that this settlement is made without prejudice to the position of either party and with reservations made by members of your Committee providing for further consideration of certain of these and several additional claims of record covering the above-mentioned period.

It was determined in conference there was nothing due the following employes:

G. M. Murray	M. D. Kerber	E. R. Geiger
W. L. Butler	J. K. Dahnke	J. F. Fortuna
C. E. Mills		

Yours truly,

H. C. Wyatt,
Senior Vice President.

B/C
WAN
REP

WSP—Please arrange payment as soon as practical, advising payroll period on which allowed.

LETTER, APRIL 11, 1966, BROTHERHOOD GENERAL CHAIRMAN J. F. McNEEL TO N&W VICE PRESIDENT H. C. WYATT.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN
PENNSYLVANIA SYSTEM-LINES WEST
CHICAGO UNION DEPOT CO.
DINING CAR STEWARDS

Room 209, 683 East Broad Street
Columbus, Ohio 43215

April 11, 1966

Mr. H. C. Wyatt
Senior Vice-President
N & W Railway Company
Roanoke, Virginia

Dear Sir:

This refers to your letter of April 7, 1966, referring to the conference in this office on March 31, 1966 at which you were represented by Mr. Fred Yancey, when the claims of various Sandusky District trainmen and conductors adversely affected by the merger under the provisions of Section 3 of the Agreement of January 10, 1962, were considered.

I have checked the attached list of amounts due thirty-nine (39) claimants and the figures on this sheet are correct. We will appreciate prompt payment of any amounts due and request this office and the Local Chairman be advised when these payments are made.

We want it clearly understood by all concerned that in final settlement of all these claims only the earnings made on the Sandusky District Scioto Division by the claimants should be used to offset their monthly guarantee, reasoning that only monies made on this territory were used to compile their guarantee. It just is not logical to restrict their protective guarantee earnings to monies earned in the twelve months prior to the merger on the Sandusky District only and then use monies made at

Bellevue, Fostoria, N & W proper yard, Columbus, Ohio, other railroads and private industry.

As stated above, we are agreeable to accepting the amounts listed on the attached list, until this matter is finally resolved as the claimants are in dire need of the money. We do anticipate further handling of this matter, as soon as prior commitments will allow. We will advise you of what steps we desire at some future date.

Your choice of Mr. Yancey to handle this matter is excellent, as he is well versed in the subject and certainly conducts himself in a manner which tends for amiable negotiations.

Yours very truly,

/s/ J. F. McNeel,
General Chairman.

cc: Mr. J. M. King, VP
Mr. C. R. Mick, LC No. 141
Mr. G. C. Gibson, Sec. No. 141
Mr. J. Fitz, LC No. 844
Mr. H. I. Fearing, Sec. No. 844
PVH: pm

LETTER, OCTOBER 12, 1966, BROTHERHOOD GENERAL CHAIRMAN J. F. McNEEL TO N&W VICE PRESIDENT W. A. NOELL.

BROTHERHOOD OF RAILROAD TRAINMEN

October 12, 1966

Mr. W. A. Noell, Vice-President
Personnel
N & W Railway Company
Roanoke, Virginia

Dear Sir:

This has reference to your letter of October 4, 1966 concerning the "test period" of the Conductors and Brakemen on the Sandusky District, Scioto Division, as provided under Section 3 of the January 10, 1962 Agreement for the Protection of Employees.

Attached to your letter was a new list of 'test period earnings' which you received from the Pennsylvania Railroad Company. We have checked the new list against the original list, furnished you by the Pennsylvania Railroad Company in March 1965, and found that the figures presented on the new list are definitely unacceptable to us.

We have attached a comparison list of the Conductors and Brakemen whose entire 'test period earnings' were made on the Sandusky Line in the twelve (12) months prior to October 15, 1964. The left hand column on the comparison list shows the earnings furnished by the Pennsylvania Railroad Company in March, 1965, without the seven percent (7%) wage increase being added from June, 1964 to October 15, 1964 inclusive and you can readily see that the right hand column shows far lesser amounts than the original list.

At our meeting on August 3, 1966 in Roanoke, we had the clear understanding that the original list furnished you by the Pennsylvania Railroad Company would be the figure acceptable to us and that we would agree to certify the figures shown on the original list, with certain corrections for Mr. K. D. White and Mr. R. S. Shilling, and the agreed upon seven percent (7%) wage increase added on.

We also agreed that we would again meet with you and work out an acceptable formula for the remaining trainmen, who made either part of their 'test period earnings' on the Sandusky Line, and for the few men who had no "test period earnings" on the Sandusky Line.

We cannot understand why you would deviate from our agreed upon principles established in our August 3, 1966 meeting and attempt to use the more recent and definitely inaccurate list you mailed with your letter of October 4, 1966.

Please arrange to have the list of the one hundred percent (100%) Sandusky earnings men completed so that we may certify this list and then move on to the remaining men, who do not have one hundred percent (100%) Sandusky earnings.

Yours very truly,

/s/ J. F. McNeel,
General Chairman.

cc: J. M. King, VP-BRT
Messrs: Mick, Fitz, Fearing, Gibson
PVH: pm

LETTER, FEBRUARY 23, 1966, BROTHERHOOD VICE PRESIDENT F. C. MONTGOMERY TO N & W VICE PRESIDENT H. C. WYATT.

BROTHERHOOD OF RAILROAD TRAINMEN

February 23, 1966

FCM—mg

Mr. H. C. Wyatt, Senior Vice President
Norfolk and Western Railway
Roanoke, Virginia

Dear Sir:

Please refer to your letter addressed to me under date of April 23, 1962 confirming our discussions in Washington, D.C. on that date, concerning the proposed agreement for protection of employees in event of approval of merger and related applications filed by the Norfolk & Western Railway Company and other carriers in ICC Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514, and I would like to deal with a pertinent part of that letter found on Page 3, which is identified as and titled VIII, Section 3.

As you will recall Vice President J. M. King accompanied me at this meeting and considerable time was spent in discussing the district from which the men who would cover the new Norfolk & Western Railway you propose to buy from the Pennsylvania Railroad, from Sandusky to Columbus, Ohio, which you advise will serve as the connecting link between the Norfolk & Western at Columbus and the Nickel Plate at Bellevue, Ohio.

If my memory serves me correctly, you had a map of the proposed system on the wall of your private car and in discussion of the particular phase of your merger I pointed out to you that the seniority district for these men encompassed Sandusky, Toledo and Columbus and advised, when we were talking, about how the men would make the transfer from Pennsylvania employment to N&W employment why it would be necessary to place bulletins at all three points so that the 50 senior men

would have first opportunity for their job in seniority order on the Norfolk & Western.

I am now advised that your representatives are holding that the area from Sandusky to Columbus comprises the seniority district, contrary to my understanding with you on April 23, 1962.

I am told that the seniority district for the men who took employment with your merged railroad over the so-called Scioto Division held seniority on a common seniority roster on the Pennsylvania Railroad Toledo Division, Lake Region and exercised seniority indiscriminately on the former Sandusky line of the Toledo Division, Toledo, Ohio-yard and road, Detroit-yard and Columbus-road, and in exercising their seniority their position on the seniority roster of this particular district was gven full recognition.

It was not my understanding when we met in 1962 that these men would be deprived of any of the benefits contained in this protective agreement when adversely affected, but we now find that you are holding that employees from this common seniority board are being afforded protection in ratio to their earnings on the so-called Sandusky line.

May I remind you of one point in our conversation where I advised you that it would be entirely possible that a man from Toledo who had not worked on the Sandusky line for years might, by reason of seniority, decide to assert that seniority and take employment with your Company over this new Norfolk & Western Railroad and both Vice President King and I were assured these men would receive full consideration.

It seems regrettable that an agreement which had the appearance of being one of the most outstanding merger agreements has now reached such a low point as to deprive men who could have stayed with the Pennsylvania but chose to take employment with your carrier are now being deprived of the benefits which I understood would be accruing to them in the event they asserted such prerogative.

I will appreciate a reply from you outlining the position you now take.

Very truly yours,

/s/ F. C. MONTGOMERY, *Vice President*

Manager, Field Service Department.

cc: Mr. F. K. Day, Jr, Asst V.P., N&W RR.
Mr. J. M. King, V.P., BRT
Mr. J. F. McNeel, Gen. Chmn., BRT
Mr. J. E. Fitz, Loc. Chmn., BRT

DEPOSITION OF W. A. NOELL.

(Taken on Behalf of the Defendant.)

* * * * *

(38)

CROSS EXAMINATION.

By Mr. Murray:

* * * * *

Q. Using this language, how do you work out a formula for a man who has not worked at all in the Sandusky Branch of the Pennsylvania Railroad Co.? A. The man who has not worked at all, or who did not work at all—receive any compensation for work performed on the Sandusky Branch prior to the merger, has no protective allowance due him, if he elected to accept employment on the Sandusky Branch subsequent to the merger.

* * * * *

(40) Q. Do I understand that your position—to be, Mr. Noell, that if a man had not worked on the Sandusky Branch during the year preceding the merger, that whether or not he would be placed in a worse position with respect to his compensation, the Norfolk & Western owed him no protective benefits whatever? A. That is true.

* * * * *

(42) Q. Well, were you familiar with the correspondence, dealing with this matter we are discussing this morning, to Mr. Wyatt from representatives of these employees? A. I rather doubt that I would have been sent any of that correspondence prior to my appointment as Vice-President Personnel. It might depend on the particular letter.

(Plaintiff's Exhibit No. 3, Noell Deposition—. Letter, dated February 23, 1966, from F. C. Montgomery to H. C. Wyatt.)

Q. I will hand you Plaintiff's Exhibit No. 3, Noell Deposition, and will ask you whether or not you are

familiar with this document or the contents of that document? A. Yes. I recall this letter—and this letter did come to my attention.

Q. Let me ask you, who is Mr. Montgomery? A. Mr. Montgomery, as I recall, had the title of Field Representative for the Brotherhood of Railroad Trainmen, and he was—his headquarters were at Cleveland.

Q. Do you know whether or not he would be a superior (43) of Mr. McNeel's in the Brotherhood organization? A. I would say that he would be.

Q. Thank you. Now, Mr. Noell, do you have a copy of this letter, for convenient reference? Paragraph six and seven on Plaintiff's Exhibit No. 3—specifically, the language which reads:

> "It was not my understanding when we met in 1962 that these men would be deprived of any of the benefits contained in this protective agreement when adversely affected, but we now find that you are holding that employees from this common seniority board are being afforded protection in ratio to their earnings on the so-called Sandusky line. May I remind you of one point in our conversation where I advised you that it would be entirely possible that a man from Toledo who had not worked on the Sandusky line for years might, by reason of seniority, decide to assert that seniority and take employment with your Company over this new Norfolk & Western Railroad and both Vice President King and I were assured these men would receive full consideration."

Now, my question to you, Mr. Noell, is, in view of that language, how can you testify here this morning that you were not aware of the fact that (44) Mr. McNeel and representatives of these employees have taken the position that those men with less than one hundred percent Sandusky Line earnings could have protective benefits coming to them?

Mr. Curphey: Object to the question.

By Mr. Curphey:

Q. Go ahead and answer it, Mr. Noell. A. This letter, apparently, stems from some complaint that the employees took directly to Mr. Montgomery's office. I think that the fact that he wrote this letter, standing alone, doesn't mean too much. I think we ought to include the answer that he got from Mr. Wyatt.

By Mr. Murray: (Continuing)

Q. Anything you want to include, of course, can be included in Mr. Curphey's redirect examination. My question to you, Mr. Noell, is, in view of your testimony that you were acquainted with this letter, is it not a fact that you were aware, during the time that you were dealing with this problem, that at least Mr. McNeel's superior was of the position that those men with less than full one hundred percent Sandusky Line earnings would be entitled to protective benefits? A. I recall seeing this letter, which is dated in 1966. If I recall my earlier testimony, I said that at a certain period—or during the negotiations I had not heard Mr. McNeel take any position that anything other than Section 3 applied to the Sandusky District employees.

(45) Q. Isn't it a fact that some time prior to January 28—between January 1st and that date in June that Mr. Hemmer and Mr. King both met with you and made their position clear that whatever formula was eventually worked out for those men with less than one hundred percent Sandusky Line earnings under the January 10, 1962 agreement, would have to include consideration for a full twelve months in which these men performed service, and in accordance with the Memorandum of Understanding attached to the January 10, 1962 agreement? A. Messrs. King and Hemmer came to Roanoke some time in June, 1966—not prior to this time—and that's when they made—only really raised the question, and I told them that Section 3 applied to the people on the Sandusky District—and this was made clear to everyone during the earlier negotiations, and was also

included in our offer of employment to the people on the former Pennsylvania Railroad.

Q. I see. So that I am perfectly clear, then, Mr. Noell, what you have just told us, you were aware of Montgomery's letter before King and Hemmer came to Roanoke in June of 1966? A. That is right.

Q. And at the time King and Hemmer came here they raised the question? A. They just raised the question.

* * * * *

(51) Q. Prior to October 16, 1964, what steps, if any, did the Norfolk & Western Railway Co. take to get the earnings records from the Pennsylvania Railroad Co. of these employees that we are talking about? A. As far as I know, we did not make any effort to get the earnings prior to October 16, 1964—at least, I have no knowledge of any attempt to get them.

Q. Were you aware prior to October 15, 1964, that many of these men had homes in Sandusky, and had worked for many years primarily in Sandusky? A. I had no firsthand knowledge of any of these men. It could be that some of the Chairmen may have made such a statement, but I have no firsthand information along that line.

* * * * *

Q. It is your testimony here this morning that it was Mr. Yancey who represented the Norfolk & Western Railway Co. in dealings which led to these claims finally being disposed of; is that your position? (52) A. Yes—Mr. Yancey acting in behalf of the Norfolk & Western Railway Co.

* * * * *

DEPOSITION OF FRANK A. JOHNSON.

(Taken on Behalf of the Plaintiffs.)

* * * * *

(15) By Mr. Murray:

Q. Do you know, Mr. Johnson, approximately how many former employees of the Pennsylvania Railroad Company, who were employed as Brakemen and members of the International Brotherhood of Railroad Trainmen elected to come over and take employment with the Norfolk and Western Railway Company? A. I do not know how many Brakemen came over.

Q. Were you aware when you assumed duties with respect to the Sandusky Line in 1965, that there were not sufficient jobs available in Sandusky to furnish employment to all of the employees who elected to take employment with the Norfolk and Western Railway Company? A. Yes.

Q. Did you understand at that time how many men who elected to work in Sandusky were unable to hold jobs there, that is, at the time you assumed duties in 1965, Mr. Johnson? A. I don't think I did.

Q. To your knowledge, Mr. Johnson, what steps were (16) taken before October 16, 1964, by the Norfolk and Western Railway Company to assure that earning records for these men were available from the Pennsylvania Railroad Company, should it be necessary to determine any protective benefits which might become due them under these protective Agreements of 1962? A. I have no knowledge of any arrangements that might have been made.

* * * * *

DEPOSITION OF JOSEPH E. FITZ.

(Called by the Defendant for Cross Examination.)

* * * * *

(14)

CROSS EXAMINATION.

By Mr. Curphey:

Q. Well, I gather from your response, Mr. Fitz, that the amount of work on the Pennsylvania in the Sandusky Yard and on the Sandusky Lines, too, in the year prior to the merger had decreased substantially? A. Your records will bear that out.

* * * * *

(18) Q. Now, were there any of the men who did not so elect and, therefore, remain in the employ of the Pennsylvania? A. Yes, sir.

(19) Q. And can you give me an idea as to approximately how many or the proportion that did not elect, as compared with the number that did? A. I would say the other 450 out of the 500 that we have been talking about, approximately 500.

Q. Did not elect? A. Did not elect.

Q. Did the majority of the men in the Sandusky Lodge elect to go to work for the Norfolk and Western? A. The majority; yes.

Q. Was it an overwhelming majority or a bare majority; can you give me some idea as to the extent of it? A. Well, it was—as a guess, I would say a two to one ratio.

Q. Now, will you explain to me the basic underlying reason why those people elected to go with the Norfolk and Western, and on the other hand, the underlying reason why those that did not elect to go? A. Well, anything I would say would be guess work and supposition on my part. I don't know another man's mind. Each man has their own reason for doing this, but if you want to talk about me in particular—

(20) Q. All right, let's start with you. A. Well, I've got a home here. I've got a family and my wife has strong

family ties, and she would balk at the idea of leaving town.

* * * * *

(60) Q. Well, that's my question, that you understood this was their position at that conference; did you not? A. Well, I can't really say this was a concrete position on their part, because, like I say, Mr. Yancey come in and would keep saying that he didn't have the authority, that he was just sent here with orders to bring these up to date, and there were other people handling these matters, and this is what he gave me to understand, that he just didn't think he had enough authority to handle these things, because this would go to the operating people above him.

Q. Did he indicate to you on that occasion that Norfolk and Western would be willing to dispose of these claims or settle these claims on the basis other than the Sandusky Line earnings? A. Well, I don't really think—whenever I would attempt to discuss the formula or something, the General Chairman would remind me that we were here strictly to get these temporary payments and that was it.

Q. Now, another appeal was taken with regard to (61) this letter of October 25, 1965; is that right? A. An appeal was taken not—not another. We referred to an appeal here in the record. An appeal was taken July 21, 1966—yes; that's right.

Q. That was the date of the hearing? A. That was the date of the hearing; yes.

Q. Am I correct that you took this appeal by means of a letter under date of April 27, 1966? A. Well, I would have to check. I thought the date was April 26; you're probably right.

Q. Very well. It was taken one or the other? A. Yes.

Q. This would be shortly after this conference in Columbus? A. Yes.

Q. And you were appealing from—withdraw that—your appeal related to General Chairman McNeel having entered into this Letter of Understanding of October 25, 1965; is that right? A. That is correct.

Q. So, again, you were—as you previously explained to me, you were objecting to this understanding for temporary payments. You wanted to have the (62) matter finally settled in accordance with the formula that you felt was applicable? A. You're half right.

Q. Very well. Explain the other half to me. A. Under the Constitution of the Brotherhood of Railroad Trainmen, and I might add there is one thing that the Local Chairmans become extremely aware of, as a matter of fact, that is the first thing they become aware of, is time limits.

Under our Constitution we have to be aware of it. Now, the time limit on appeals under Rule 13 is one year.

The Board convenes in January and July. I did not get by the January Board and my last shot at the appeal was the July Board of Appeals, and I appealed because I still felt that the earnings should be over the entire division, and also to protect myself under the Constitution, because I wouldn't have been able to come back and say at some future date that I took exception to this, and then the men could come and say, "Why didn't you appeal?"

This is why I appealed under the rules of the Constitution, and I protected myself in this spot, (63) because the next session of the Board of Appeals would have put me beyond the time limits.

Q. I see. When you use the expression, earnings over the entire division, are you using that as opposed to earnings on the Sandusky Line? A. I am.

Q. As opposed— A. So once again I might repeat myself here, but I think you covered this in one of your previous questions and answers, that the Norfolk and Western's position at this conference on March 31, 1966, was pretty clear in my own mind, that they were going to use a formula based upon the Sandusky Line earnings only, and this was the whole bone of contention, that they couldn't get these earnings segregated, and this was why Jack said the reason for the Letter of Understanding, and I told Jack I understood it, and he told me that in all eventuality we would probably end up with 100 per cent

Toledo earnings anyways, but he was in contact with the Columbus men and there was pressure coming from all directions to get something moving.

Q. During the conference of March 31, 1966, in (64) Columbus, was Implementing Agreement 1-A discussed at all? A. Never.

Q. Never brought up? A. No, because if it had been I would have jumped right through the ceiling right then.

Q. When was the next conference that you attended after March 31, 1966, with regard to these claims? A. Well, I imagine it was in February of 1967.

Q. Was that at Mr. McNeel's office in Columbus? A. No; it wasn't.

Q. Where was it? A. It was in Roanoke.

Q. You went down there with Mr. McNeel, did you? A. We were there. He was there prior to the time I got there.

Q. What was your understanding of the purpose of that conference before you went down there? A. In 1967?

Q. Yes; the second one. A. Well, we were far behind, even under the Letter of Understanding, even on the temporary payments, and it was my impression that we were going to attempt to (65) get these people with no Sandusky Line earnings a formula that would be worked out, and to get them some protection and bring up to date the claims that would show these men had 100 per cent Sandusky earnings.

Q. Of course, it developed otherwise? A. It certainly did. Again we came to this conference where the carrier had already preconceived notions, which they already laid down on the table, you know where this is a situation of either like it or leave it. I'd like to have left it. That's what I would like to do.

Q. Had you had any meetings with General Chairman McNeel during the month or several months preceding this February 20, 1967 conference in Roanoke about the same subject matter? A. No, but let me say this, Mr. Curphey: My monthly settlement meetings were held in Columbus, and Jack McNeel's office is in Columbus, and

I made it a point to see him when I was there, and I would mention this to him when I was in Jack's office, as well as oral conversations, and he assured me, "Joe, we will get your formula worked out and get you the protection under the January 10, 1962 agreement."

(66) This was the understanding we had all the way along.

Q. You are talking about correspondence back and forth concerning this, or conferences called specifically for this? A. No.

Q. And I understand your appeal with regard to the October 25, 1965 Letter of Understanding was denied; is that right? A. It was denied, and I got the message from the Board of Appeals that, "Joe, you are an alarmist. Your men have protection under the January, 1962 agreement, and you don't have a thing to worry about."

Q. Mr. Fitz, back to this conference in Roanoke on February 20, 1967. Did you at any time during that conference take the position that General Chairman McNeel did not have the authority to negotiate on your behalf or on behalf of the Sandusky Line? A. I didn't see any reason to take that position, because General Chairman McNeel was backing my position, saying we will be protected under the January 10, 1962 agreement. He was backing my position.

(67) Q. Did you take the position or advance the argument during this conference that the Implementing Agreement 1-A was not an effective and valid agreement? A. I didn't take that position that it was not an effective and valid agreement, but I was assured by the General Chairman that this agreement was meant to—this came to me after the Board of Appeals' decision, that it was my understanding this was meant to cover the 100 Engineers, and in one case of an employee we have a Grand Lodge officer, and this would be more specifically meant to cover people working out of Columbus, because there didn't seem to be any dispute about their earnings on the Sandusky Line.

* * * * *

(75) Q. And I assume this was discussed in your conference in Roanoke, that is a follow up for this particular period of time? A. It was my understanding at that conference, and it was the General Chairman's position that, "Joe, let's bring this up to date so far as we can under the 75 per cent letter, and some people that had agreed to 100 per cent, they were mostly Columbus people.

* * * * *

(85) Q. Did Mr. McNeel send you a copy of this letter of March 3, 1967? A. He did; that was the impetus that sent me to an attorney, that was the thing that made me see an attorney, because I had tried everything in my power to settle this thing reasonably, and I asked Steve Young, anybody that would bend an ear to me to help, and I got the same advice from all of the people involved, that the I.C.C. has the power invested in them to order the merger, but they do not have the power to police it, and if you have a problem, go see an attorney, so I eventually took their advice.

Q. Did you discuss with Mr. McNeel sending a reply to this letter? A. I may have mentioned it to him in an offhand way, (86) but Jack looked at it and shook his head and said this was ridiculous and that was about the extent of our conversation along those lines, I would expect.

Q. Well, you did not have any discussions about replying to it, I gather? A. Not to my recollection. Like I say, I might have made an offhand comment on it or something like that, but at this point I was convinced there was only one way to resolve this thing properly.

Q. Well, to your knowledge, Mr. McNeel did not, in fact, reply to the letter? A. To the best of my knowledge he didn't.

Q. Then how about the letter of April 3, 1967, with reference to the later period of December, 1965 through September, 1966; do you know whether he replied to that letter? A. I don't know that he directly replied to it. There was—I'm not even sure of that. I can't say. I honestly don't know, Mr. Curphey.

Q. To the best of your knowledge, did Mr. McNeel have the same understanding as a result of this conference as you did? A. Absolutely; even as late as October, 1968, he (87) gave me correspondence to that effect, that our people were entitled to the protection of the January 10, 1962 agreement.

* * * * *

(88) Q. Mr. Fitz, without regard to the problems arising under the Schedule, and without regard to your position with respect to the January 10, 1962 agreement, as set forth in the appended lawsuit, have you stated in writing in any communication where the Norfolk and Western claims were not disposed of as stated by Mr. Yancey? A. No; I don't think so. The reason I say that is because I haven't for the simple reason that it was—there was no doubt that between Jack McNeel and myself that these were not settled, that was our understanding, and that we were not satisfied, and that was just one point.

(89) Now, you have to understand that he is a businessman and he represents probably 10,000 people down there, and he has a big committee and 53 Local Chairmen. Now, you don't go writing letters putting a lot of burden on the Local Chairman. He can't read every one of them.

At one point, as I recall, he did take some exception to one of our former associates here who wanted to engage in a letter writing contest, but he made it quite clear that as a businessman he didn't have the time just to sit down and steadily write letters, but he knew there was no question between us of our respective positions, and you just simply can't over-burden the man by making him answer every letter that comes through.

* * * * *

(99)

DIRECT EXAMINATION.

By Mr. Murray:

* * * * *

Q. Now, perhaps I misunderstood you or didn't hear your answer, but what was the Board of Appeals' position with regard to the Implementing Agreement 1-A as it affected the rights of the men in Lodge 844 with less than 100 per cent Sandusky earnings? A. Well, they told me that this agreement was along with the Letter of Understanding temporary in nature; that it was meant to protect people in Columbus who had been—whose payments had been stopped or forestalled due to the fact that the carrier didn't come up with Sandusky Line earnings, and these people had 100 per cent Sandusky Line earnings, and this was meant to take care of these people, and in one case a gentleman that we have here who is a Grand Lodge officer—

Mr. Curphey: Objection to that response, since it includes hearsay and a conclusion of a witness.

Q. Joe, just try to limit yourself specifically to (100) my question here. Did I understand you correctly that the Board of Appeals took the position that you would be fully protected when a formula was worked out under the January 10, 1962 agreement? A. Yes.

Q. And was that at the appeal in July of 1966? A. It was at the appeal and in their decision; yes.

Q. Did they refer to a specific part, as you recall, either in writing or orally, at that time? A. Yes.

Q. A specific part of the January 10, 1962 agreement, did they? A. Yes.

Q. Which would afford you this protection? A. Yes.

Q. What part of the January 10, 1962 agreement did they refer to you? A. The Memorandum of Understanding attached to and made a part of the January 10, 1962 agreement.

Q. Do I understand you correctly that General Chairman McNeel did put his position on the record to be that

there never had been a settlement of claims of those men with less than 100 per cent Sandusky Line (101) earnings in writing to you, sometime after the conference in Roanoke on February 20, 1967? A. Yes; he did.

Q. Do you recall the date of that letter? A. No.

Q. Approximately? A. I think it was October 10, 1968.

Q. All right, Mr. Fitz, do you know whether or not any of the men with less than 100 per cent Sandusky earnings accepted any payments from the Norfolk and Western Railway Company after February 20, 1967, and I refer you specifically to any men whose names appear on Attachment A, B, or C, shown by Mr. Curphey to you during his Cross Examination of you? A. No; I don't think there have been.

Mr. Murray: I have nothing further at this time.

RE-CROSS EXAMINATION.

By Mr. Curphey:

Q. Mr. Fitz, when you received this letter from Mr. McNeel in January of 1966, in which he referred to the Implementing Agreement 1-A, weren't you curious as to (102) what he was talking about? A. Yes and no. I don't like to confess to being ignorant, Mr. Curphey, but being a new Local Chairman, I was curious but I couldn't see where this thing would have any barring whatsoever on what we were talking about. His letter was clearly in error, because he said I had referred to it, and I didn't even know anything about it up to the time of the Board of Appeals.

Q. And you did not make any inquiry of him as to what he was talking about? A. Not until we got to the Board of Appeals. I had been assured all the way that we were going to be protected under the January 10, 1962 agreement, and I might say that Jack even was a little bit upset with me about appealing, but I explained to Jack that we've got a time limit in the Rules and I have to protect myself and I have to protect these people that I

represent, and this was primarily the reason for the appeal.

I have read more than one appeal and I will say the majority of them have overshot the time limit and (103) I didn't want that to happen, because I didn't want to lose out on the appeal because of that. They are very strict on time limits, and I wanted to follow the rules right down the line.

* * * * *

DEPOSITION OF FRED S. YANCEY.

(Taken on Behalf of Plaintiffs.)

By Mr. Murray:

* * * * *

(30) Q. * * * Now, Mr. Yancey, do I understand it is your position that the claims of these Plaintiffs have been settled? A. Right.

Q. And you are telling us then that someone, some representative of these employees, agreed to settle these claims. Is that your position? A. Yes; with a duly accredited representative.

Q. When? A. When?

Q. Yes; when did a duly accredited representative agree that these Plaintiffs' claims would be finally settled by taking their earnings between the dates represented and stated here as the test period on the Implementing Agreement 1-A, and dividing by 12 and using that figure as to their protective benefits or (31) their average monthly compensation? A. I don't remember the exact date, but here is the letter from the representative.

Q. Is it your answer that you don't remember the exact date? A. Well, we met. We had several conversations and we got together and calculated the figures and went over them together and agreed to it.

Q. I would like to see—do you have anything in writing any place by a duly accredited representative of these employees who agreed, as a final settlement for their claims, that they would be entitled to an average monthly compensation, based upon only the 12 months' earnings on the Sandusky Line divided by 12 as a final settlement of all their claims? A. Here is the letter from their representative.

Q. You are showing me a letter dated October 12, 1966? A. Yes.

Q. And you refer to a letter addressed to Mr. W. A. Noell, and this letter is from Mr. McNeel; am I correct? A. Yes.

* * * * *

(39) Q. Okay now. Using any of the correspondence you have there, I want to ask you the same question that I asked you a moment ago, what, if any, documentation do you have in your possession, or are you aware of, whereby a duly accredited representative of these Plaintiffs agreed to accept as final settlement of these Plaintiffs' claims, any amount or any formula with respect to the average monthly compensation due, arising out of the merger? We are now talking about duly accredited representatives. A. Well, the next settlement was made in our letter of March 3rd—

Q. I'm sorry, Mr. Yancey, I am not trying to confuse you, but my question simply is—

Mr. Curphey: Just a moment. The witness is trying to make sure that he understands your question.

(Discussion off the record.)

By Mr. Murray:

Q. What writings do you have from a representative, a duly accredited representative of these Plaintiffs, indicating that the final settlement of this matter (40) had been made; refer to the date of the letter, if you will, please? A. I don't have a letter from them, but I have a letter that sets out that the agreement was made.

Q. Yes; do you have a letter from them? A. I do not have it right here. They may have written one and may not have written one; I don't know, but we settled this stuff in a conference, as you know—

Q. I'm not trying to cut you off, Mr. Yancey, but I want to know whether you have such a letter here? A. I don't have such a letter here. I don't see one here.

Q. Are you aware of such an agreement in writing from a duly accredited representative which does this, Mr. Yancey? A. Your question is, as opposed to—

Q. I am asking you this question very simply, I said from a duly accredited representative, any writings. A. No doubt we have.

Q. But you don't have it here? A. I don't have it with me; no. I do know that an (41) agreement was made.

Q. Would you be good enough, Mr. Yancey, to furnish us with a copy of such a letter? A. If there is such a letter as that; yes.

Q. I take it then you will be good enough to furnish us with a copy of such a letter, if there is such a letter? A. Yes; if I have it I will certainly give it to you.

Q. You will furnish us a copy, I hope, before the trial on September 15, 1969? A. Yes.

* * * * *

(49) Q. Do I understand your position to be that the final settlement of this matter was made orally with Mr. McNeel?

Mr. Curphey: Objection to that. The witness didn't so testify.

Q. Maybe I misunderstood. I will ask you this then; when do you recall reaching a final settlement with Mr. McNeel concerning this matter? Give me the month, the day, the year as best as you can. A. It was in two letters.

Q. My question is, first of all, when? A. Our March 3rd letter concerning that February 20, 1967 conversation.

Q. So then this would be February what? A. The exact date I don't know, but I believe it was February 20, 1967.

(50) Q. And who was present at that conversation? A. I believe there was Fitz and Mr. Mick, and of course Mr. McNeel.

Q. If I understand your testimony correctly, Mr. McNeel agreed on February 20 to finally settle these claims of these men who are in this lawsuit? A. That's right.

Q. Is that your position? A. You have it set out in—

Q. You can refer to anything you want to use to refresh your recollection.

Mr. Curphey: Let the witness describe it, Mr. Murray, in his own words.

Mr. Murray: While I realize that there is a dispute as to whose witness this is, nevertheless this witness must be responsive to any questions that are asked, and he is not being responsive directly to the question.

If he is more responsive, then I wouldn't interrupt.

A. In our letter of March 3, 1967, we refer to conversation on February 20, 1967, with Mr. McNeel, Mr. (51) Fitz and Mr. Mick of his committee, and we came to the agreement, and it is set out in that letter the amount of money that would be payable for the period October 16, 1964 through November of 1965, and attached to that letter marked A, B, and C, sets out the amounts agreed upon.

Mr. Murray: Now, I will ask that the last part of that answer be stricken as unresponsive.

By Mr. Murray:

Q. So that I understand you then, your answer is that the date would be February 20, 1967? A. That's right.

Mr. Curphey: I oppose your motion to strike for the reason that I think it is responsive, and represents an attempted explanation by the witness to answer your question.

Mr. Murray: The Court can rule on these, but I didn't ask for any elaboration. I just asked him for the date when this conversation and agreement was had, and he told me the date was (52) February 20, 1967, as being the date of the conversation when the agreement was reached.

By Mr. Murray:

Q. At that agreement, do you recall—did Mr. McNeel sit down and sign anything indicating that there had been an agreement? A. No; he didn't sign anything.

Q. That's all; thank you. Did Mr. Fitz sign anything? A. I wasn't there when Mr. Fitz—

Q. The answer is you didn't see him sign anything? A. That's correct.

Q. But you talked it over—I'm just trying to get your position. You talked it over and agreed on that date to finally settle these claims? A. Right; the amount and everything.

Q. The amount and the test period and everything, is that it? A. Yes.

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Petition For Writ

Not Available For Filing

At this time.